86-6109

DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

FREDERICK MATHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Should this court resolve a conflict in the circuits as to whether a criminal defendant may use the entrapment defense when he admits committing all of the acts constituting the offense but denies possessing the requisite criminal intent?

II. Does the Seventh Circuit's interpretation of Batson v. Kentucky impermissibly allow prosecutors far more leeway in making jury selections than this Court intended?

LIST OF PARTIES BELOW

The petitioner, Frederick Mathews, and the United States of America were the parties to the proceeding in the court whose judgment is sought to be reviewed.

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PETITION FOR WRIT OF CERTIORARI TO THE
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The petitioner, Frederick Mathews, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on October 9, 1986.

OPINION BELOW

The opinion below is United States v. Mathews, which is reported at 803 F.2d 325 (7th Cir. 1986), and is reproduced in the Appendix to this Petition.

JURISDICTIONAL GROUNDS

The decision sought to be reviewed was decided on October 9, 1986. The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc was entered October 29, 1986. This Court has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Petitioner was convicted of violating 18 U.S.C. § 201(g), which provides as follows:

> Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; .
>
> . . . .
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

The Small Business Administration ("SBA") is an agency of the United States. Its purpose is to assist small businesses with financing, business advice, and helping to obtain government contracts.

Petitioner Frederick Mathews, who is black, was employed in the Milwaukee SBA office as a Business Development Specialist. His job was to facilitate the 8A Program, which is designed to encourage small businesses owned by socially and economically disadvantaged small business concerns.

Midwest Knitting Mills, Inc. was, at all times material to this case, a qualified small business eligible for participation in the 8A Program. James DeShazer was its owner and operator. At some time prior to November or December of 1984, Midwest Knitting Mills arranged with the SBA to receive advance payments to enable it to perform on various contracts.

Prior to 1979, DeShazer knew Mathews on a social basis. DeShazer and Mathews had lunches and evening drinks together, played the lottery together, and shared discussions of personal and family matters. In fact, Mathews was a quiet man, a loner

who kept to himself and considered DeShazer a friend as well as a business acquaintenance, particularly in light of the confidences they shared. DeShazer also considered Mathews a personal friend. At one point in 1984 Mathews asked for and received from DeShazer a loan in the amount of $1,500.00 to assist in paying his daughter's college expenses.

In November of 1984, Mathews was relieved of full responsibility for the Midwest Knitting Mills file. At the same time, in November or December of 1984, Midwest Knitting Mills began having problems getting its advance payments through the SBA to facilitate its purchase of raw materials to perform its government contracts.

During that time, DeShazer also started "getting a lot of heat" from the Navy's purchasing agent about fulfillment on the contracts. He told the agent that he suspected that Mathews was not processing the documents, and said that Mathews kept asking him for money.

In approximately January of 1985, the FBI contacted DeShazer regarding his allegations that Mathews was soliciting loans from him, and asked DeShazer to assist in an investigation of Mathews. DeShazer agreed to tape-record conversations with Mathews if the FBI would supply him with equipment.

On or about February 22, 1985, Mathews was informed by his superior at the SBA that his employment would be terminated within the next month or so. Mathews told DeShazer and other clients about his impending termination.

In late February of 1985, DeShazer and Mathews met at a restaurant. Although DeShazer denied knowing that Mathews was being terminated, DeShazer told Mathews that he had arranged a loan of approximately $12,000.00, that he had the money in cash in his garage, that he needed only $7,000.00 of it, that he did

not want his wife to find out about the extra cash, and that he would loan $4,200.00 to Mathews. Mathews was interested in the loan because he was financially strapped due to his impending termination, his separation from his wife, and the resultant increased living expenses.

Over the next several weeks, the subject of that loan came up in conversations between DeShazer and Mathews on several occasions. Ultimately, Mathews decided to accept the loan as a personal loan if DeShazer was sincere about offering it.

On April 8, 1985, DeShazer called Mathews and asked Mathews to meet him after work. DeShazer gave Mathews a ride to the service station that was repairing Mathews' car, and on the way there DeShazer again offered to loan the money to Mathews. DeShazer next arranged a meeting during which he would give the loan money to Mathews; however, Mathews did not keep that appointment. In a telephone conversation on April 22, 1985, the night before their final meeting, DeShazer asked Mathews if he was still interested in the loan and suggested that Mathews might not get any of it because DeShazer might spend it himself.

Finally, on April 23, 1985, DeShazer again called Mathews and asked Mathews to meet him at a hotel in Milwaukee to pick up a repayment schedule with the I.R.S., an important document for DeShazer's SBA matters. During this and some of the other conversations between the two men in the preceding weeks, DeShazer continued to ask about the processing of his advance payment documents at the SBA. Mathews explained, as he had previously, that everything was in order and had been processed. Because DeShazer seemed upset, Mathews "let him rant and rave on," although he was in a hurry and thinking of other matters. DeShazer then said he had the loan money there, and Mathews accepted it. Mathews said they could leave the

restaurant together, but DeShazer said they should leave separately. Mathews was arrested as he left the hotel.

Mathews was charged with receipt of money as an employee of the SBA, in violation of 18 U.S.C. § 201(g). The United States District Court for the Eastern District of Wisconsin had original jurisdiction pursuant to 18 U.S.C. § 3231.

At trial, defense counsel moved for a mistrial on the ground that the government exercised its peremptory strikes to remove from the jury panel all three of the blacks on the panel. The defendant was black, as was the government's main witness. The government stated on the record the reason each black venireperson was peremptorily excused:

> (1) Mrs. Switzer had reservations about the use of tape recorded evidence.
>
> (2) Ms. Phenix arrived late to court, which the government interpreted as a lack of commitment to the proceedings.
>
> (3) Mr. Robinson seemed hostile to the government attorney.

Ms. Phenix was not the only person who was late returning to court, and a white woman who was also late was kept on the jury. In addition, Janice Kluz, a white woman, also expressed reservations about tape-recorded conversations, but was kept on the jury. The trial court found the government's reasons rational, and though the judge admitted he had noticed nothing unusual about Mr. Robinson, he added information regarding Ms. Phenix's posture. He also found that because the principal witness on each side was black, the presence or absence of a black juror would not appear to have any significant impact upon the jury. Finally, the court noted no pattern of the United States Attorney's Office for the Eastern District of Wisconsin excluding blacks from juries. Accordingly, the trial court denied the motion for mistrial.

Following the entry of judgment on October 18, 1985, Mathews filed a timely notice of appeal. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S REQUIREMENT THAT A DEFENDANT SEEKING TO USE THE ENTRAPMENT DEFENSE MUST ADMIT THE CRIMINAL INTENT AS WELL AS THE ACTS CONSTITUTING THE OFFENSE CHARGED IS IN DIRECT CONFLICT WITH THE SUPREME COURT'S DECISIONS AND THE DECISIONS OF AT LEAST SEVEN OF THE OTHER CIRCUITS.

The entrapment defense is premised upon "the notion that Congress could not have intended criminal punishment for a defendant who has committed all of the elements of a proscribed offense, but was induced to commit them by the Government." United States v. Russell, 411 U.S. 423, 435 (1973). Mathews admitted committing the acts constituting the offense charged, but denied possessing the requisite criminal intent. His position as to entrapment was and is that the evidence regarding scienter is the result of entrapment by the Government.

This Court's decisions over the past fifty-four years have held that the entrapment defense "'focus[es] on the intent or predisposition of the defendant to commit the crime' . . . . rather than upon the conduct of the Government's agents," and that "'[i]t is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.'" Hampton v. United States, 425 U.S. 484, 488-89 (1976)(quoting United States v. Russell, 411 U.S. 423 (1973)). See also Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435, 442 (1932).

In the district court, Mathews filed a motion in limine seeking permission to present evidence and have the jury receive instructions on the entrapment defense as well as on the defense of lack of criminal intent. That motion was made necessary by the general rule in the Seventh Circuit which prohibits a defendant from pleading entrapment if he denies the act charged. E.g., United States v. Rodgers, 755 F.2d 533, 550 (7th Cir. 1985); United States v. Johnston, 426 F.2d 112, 114 (7th Cir. 1970). That rule, however, has recently received substantial criticism in the Seventh Circuit, as will be discussed below.

The Seventh Circuit requires the defendant to admit the acts constituting the offense with which he is charged, but is not clear as to whether an admission of the acts but a denial of the criminal intent gives rise to a situation in which the entrapment defense may appropriately be given. In United States v. Johnston, the Seventh Circuit held that "absent admission of the act an instruction on entrapment will not be submitted to the jury." Id., 426 F.2d at 114 (emphasis added). More recently, the Seventh Circuit held that "it is clear in this circuit that a defendant must admit the alleged acts which constitute the crime with which he is charged in order to raise an entrapment defense." United States v. Liparota, 735 F.2d 1044, 1048 (7th Cir. 1984) (emphasis added). That rule was reiterated in the Seventh Circuit's most recent ruling on the issue in United States v. Rodgers, 755 F.2d 533, 550 (7th Cir. 1985), where the Seventh Circuit noted the general rule prohibiting a defendant from pleading entrapment while simultaneously denying the act charged.

The trial court in the instant case denied the motion in limine on the ground that in order to utilize the entrapment

defense, "the defendant must concede that what he did was wrong, and that he was encouraged to do that by virtue of the acts of the Government or Government witnesses, or other individuals acting for or on behalf of the Government." (R. 37:89). Because the defendant here denied that he "did in fact engage in the conduct that he has been accused of," the court held that the entrapment defense was not available to him. (R. 37:89).

The trial court's summary of defendant's position was not entirely accurate. This was not a case where the defendant denied accepting any money from DeShazer. Mathews admitted accepting the money, but said that he was entrapped into doing so. As noted earlier, he admitted all of the acts constituting the offense, but denied having the mens rea necessary to convert otherwise innocent conduct into a criminal offense.

The jury therefore could have consistently found that Mathews accepted the payment, but that even though he accepted the payment he never possessed the requisite criminal intent to convert his acceptance of the loan to acceptance of a bribe. On the other hand, the jury could have found that the circumstantial evidence proved that Mathews did in fact possess the requisite criminal intent at the time he accepted the loan, but that he was not ready and willing to enter into that type of transaction without the inducements and urgings of DeShazer, and thus Mathews would be entitled to the entrapment defense. Denying Mathews the use of the entrapment defense in such circumstances effectively precluded him from using an entire theory of defense which was wholly consistent with his admission of the acts involved but denial of the criminal intent.

On appeal, the Seventh Circuit emphasized and clarified its rule that a defendant who pleads entrapment must admit that he had criminal intent, but then assert that the government implanted the criminal design in his mind. The Seventh Circuit found that position "inconsistent per se with the defense that the defendant never had the requisite criminal intent." United States v. Mathews, 803 F.2d 325, 327 (7th Cir. 1986)(App. 103). Although Mathews has never claimed that he had any criminal intent, the Seventh Circuit's approach clearly allows use of the entrapment defense only when the defendant admits having criminal intent and doing all of the acts, but claims that he would not have had the criminal intent had not the government implanted that intent in this mind.

The Seventh Circuit's current position directly conflicts with the Supreme Court's view that there is no inconsistency in joining an entrapment plea with a not guilty plea. Sorrells, 287 U.S. at 452. Following that reasoning, the Ninth and Fourth circuits allow a defendant to deny all elements of a charge. United States v. Demma, 523 F.2d 981 (9th Cir. 1975); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958). The Second Circuit also allows a plea of entrapment if a defendant does not admit the offense charged, so long as the defendant does not actually deny it. United States v. Valencia, 646 F.2d 1158 (2d Cir. 1980).

As noted earlier, the Seventh Circuit has been tempted on prior occasions to reconsider its rule that the defendant may not deny the offense and plead entrapment. Rodgers, 755 F.2d at 550; United States v. Nicosia, 638 F.2d 970, 972-73 (7th Cir. 1980). In fact, in Nicosia, Judge Swygert argued strongly and persuasively that the rule is no longer valid in the Seventh Circuit and is illogical where scienter is the issue in

a particular case. Nicosia, 638 F.2d at 976-79 (Swygert, J., dissenting).

Under the Supreme Court's decisions from Sorrell to Hampton, the key question when determining whether a defendant is entitled to use the entrapment defense is, where did the criminal intent originate? If it originated with the defendant -- in other words, if the defendant was predisposed to commit the criminal act -- the defendant is not entitled to use the entrapment defense. On the other hand, if the defendant was not predisposed, and the intent originated with and was induced in the defendant by the government, entrapment is a valid defense. E.g., Sorrells, 287 U.S. at 442. "The requirement that the defendant concede a state of mind is in direct conflict with the Sorrells conception of entrapment." Demma, 523 F.2d at 983.

The circuits are sharply divided on whether a defendant can claim entrapment while denying scienter. Several circuits allow the entrapment defense where, as in the instant case, the defendant admits committing the acts charged but denies possessing the requisite mens rea. For example, in United States v. Kelly, 748 F.2d 691 (D.C. Cir. 1984), an ABSCAM case, the District of Columbia Circuit held that the entrapment instruction was properly given where the defendant admitted he took a bribe, but claimed he did so to further an investigation and therefore lacked the necessary criminal intent.

The Fifth Circuit Court of Appeals, sitting en banc, recently clarified a long line of conflicting prior cases in that circuit when it held that if a defendant admits the acts charged but presents evidence negating his criminal intent, he is entitled to an entrapment instruction. United States v. Henry, 749 F.2d 203, 205-06 (5th Cir. 1984)(en banc). The

Fifth Circuit took the approach that the accused is not guilty if he was not predisposed to commit the crime, rather than the approach that he is guilty of the crime but can avoid punishment because the government entrapped him. Id. at 209. In so doing, the Fifth Circuit aligned itself with the United States Supreme Court's long line of cases cited earlier.

Similarly, the First Circuit held that a defendant was entitled to receive the entrapment instruction where he admitted facts sufficient to convict him of the offenses charged, but denied criminal intent in performing the acts in question. In United States v. Caron, 588 F.2d 851 (1st Cir. 1978), the First Circuit

> found no inconsistency between trying to convince the jury that the acts alleged did not add up to the crime charged and trying to convince the jury that one was entrapped into such innocent acts. A defendant can claim that he was induced by the government to perform acts which were, after all, innocent and which he contends did not constitute a violation of law of the sort for which he was induced.

Id. at 853 (emphasis in original).

The Eleventh Circuit Court of Appeals prohibits use of the entrapment defense if it conflicts with another defense theory, with certain exceptions. An entrapment defense is allowed in conjunction with a not guilty plea as long as the defenses are not so inconsistent as to confuse the jury. United States v. Walker, 720 F.2d 1527, 1534 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984). As long as such seemingly inconsistent defenses are not "impermissibly inconsistent" -- that is, they do not disprove each other -- they are allowed. United States v. Smith, 757 F.2d 1161, 1168 (11th Cir. 1985). The Smith court cited the Fifth Circuit's cases, thereby indicating some inclination toward that circuit's position allowing use of the entrapment defense if the defendant admits the acts but denies the intent.

The Second Circuit's position seemed to be clearly established in United States v. Valencia, 646 F.2d 1158 (2d Cir. 1980), where that court held that the entrapment defense was available to a defendant who did not admit the allegedly criminal acts as long as he did not actually deny them. In United States v. Mayo, 705 F.2d 62 (2d Cir. 1983), however, that court, referring to the Fifth Circuit's position, specifically reserved ruling on how it would decide if the defendant "had not denied the acts alleged in the indictment, but instead had admitted the acts and offered an explanation of his conduct that was consistent with his theory of entrapment." 705 F.2d at 73.

At the far ends of the spectrum are those circuits which require the defendant to admit every element of the offense charged, including mens rea, before the entrapment defense is available, and those circuits which allow the defendant to claim totally inconsistent defense. The former group includes the Third Circuit, United States v. Janotti, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982); the Sixth Circuit, United States v. Mitchell, 514 F.2d 758 (6th Cir.), cert. denied, 423 U.S. 847 (1975); and the Tenth Circuit, United States v. Mora, 768 F.2d 1197 (10th Cir. 1985), cert. denied, 106 S. Ct. 856 (1986). The Mora court expressly referred to the division in the circuits, and attempted to briefly categorize the circuits' various positions. 768 F.2d at 1198 n.1.

The latter group comprises the opposite extreme, consisting of those circuits which permit totally inconsistent defenses and allow the defendant to assert entrapment without conceding that he committed the crime or any of its elements. United States v. Demma, 523 F.2d 981 (9th Cir. 1975); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958). The Ninth Circuit

concluded that a defendant's denial of the acts constituting the offense, while asserting entrapment, simply raises a credibility issue for the jury. Demma, 523 F.2d at 985.

The above discussion demonstrates that the Seventh Circuit's requirement that a defendant seeking to use the entrapment defense admit all elements of the offense charged, including intent, is contrary to a line of Supreme Court cases dating back fifty-four years. Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 411 U.S. 423 (1973); Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). It is also in direct conflict with at least seven of the other circuit courts of appeals. United States v. Henry, 749 F.2d 203 (5th Cir. 1984); United States v. Kelly, 748 F.2d 691 (D.C. Cir. 1984); United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984); United States v. Valencia, 646 F.2d 1158 (2d Cir. 1980); United States v. Caron, 588 F.2d 851 (1st Cir. 1978); United States v. Demma, 523 F.2d 981 (9th Cir. 1975); Crisp v. United States, 262 F.2d 68 (4th Cir. 1958).

The Seventh Circuit's general rule is not easily applied in the instant case. Mathews acknowledged receiving money and performing all acts necessary to establish that the offense occurred. Under the general rule, therefore, the trial court should have allowed Mathews to claim entrapment, because he met the necessary prerequisite of the Seventh Circuit's present rule. The only factor Mathews denied was the criminal intent to receive the money as a gratuity in relation to his employment at the SBA. He at all times considered the money a personal loan from a friend, as had occurred between them in the past.

The facts provide a more than sufficient basis on which the jury could conclude that Mathews was not predisposed to solicit and receive money. His character was never in question. He had no prior convictions. The government, through DeShazer, suggested the loan to Mathews, at a time when Mathews was especially vulnerable due to his impending termination and increased financial pressures. Mathews did not solicit that loan. Had the jury been allowed to consider the entrapment defense, it very well could have found that Mathews was not predisposed to commit the offense, and that he would not have done so had not DeShazer, on behalf of the government, persisted.

In 1958, Chief Justice Warren wrote that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." Sherman, 356 U.S. at 372. Mathews was not a criminal who insisted that DeShazer loan or give him money to further his SBA affairs. Nothing in the evidence suggests that. On the contrary, Mathews was the unwary innocent who, perhaps, naively, believed that his "friend" conveniently took out an extra-large loan just when Mathews was desperate for extra money, and insisted that Mathews share his bounty. Mathews' denial of intent thus was entirely consistent with his claim of entrapment. He should not be precluded from using that defense because the Seventh Circuit continues to interpret the entrapment defense in a manner wholly contradictory to the decisions of this Court and seven other circuits.

Where, as here, the defendant freely admitted all acts, but denied having the criminal intent, his evident lack of predisposition to enter into the loan arrangement may well have been sufficient for the jury to acquit Mathews on the basis that he

was entrapped. Accordingly, the entrapment instruction should have been given. In another circuit, such as the District of Columbia Circuit, the First Circuit, the Fifth Circuit, and possibly the Second Circuit or the Eleventh Circuit, the instruction would have been given.

II. THE SEVENTH CIRCUIT'S INTERPRETATION OF BATSON V. KENTUCKY ERRONEOUSLY PERMITS PROSECUTORS MORE BIAS IN VENIRE DECISIONS THAN THIS COURT'S DECISION ALLOWS.

The Seventh Circuit correctly summarized the holdings of Batson v. Kentucky, 106 S. Ct. 1712 (1986), as requiring the defendant to make a prima facie showing of discrimination in selection of the jury panel, at which point the burden shifts to the prosecutor to present a neutral explanation for the challenges to black jurors. Mathews, 803 F.2d at 329-30. The Seventh Circuit carefully noted, yet seemingly overlooked, the Batson caution against allowing the prosecutor to rebut the prima facie case by merely denying a discriminatory motive or claiming good faith. Mathews, 803 F.2d at 330.

Yet it was just such an explanation the prosecutor provided regarding the last strike, Mr. Declinton Robinson. The prosecutor claimed she sensed hostility from Mr. Robinson, and the district court accepted her explanation, while commenting that he noticed no such problem. Of course, the trial court did not have the benefit of Justice Marshall's reminder that "[a] prosecutor's own conscious or unconscious racism may lead him [or her] easily to the conclusion that a prospective black juror is 'sullen' or 'distant' . . . ." or in this case, hostile. Batson, 106 S. Ct. at ____ (Marshall, Jr., concurring).

Similarly, the strikes against the other two blacks, Mrs. Switzer and Ms. Phenix, were premised upon reasons that applied

equally strongly to two white women who were kept on the jury. Was it mere coincidence that, given the concerns in question, the black women were stricken and the white women were not? Or did the "facially neutral reasons" conceal a conscious or unconscious discriminatory intent to remove the blacks from the panel? Legitimate, facially neutral reasons lose their credibility as bases for striking veniremembers when those reasons apply equally strongly to whites, who are left on the jury.

No explanation was requested by the trial court or provided by the prosecutor as to the blatantly disparate treatment of identical concerns about black jurors and white jurors. The district court seemed to be impressed by the amount of time the prosecutor used to make her strike decisions. If that is to be a factor in weighing the credibility of the government's rebuttal to the defendant's prima facie case, the prosecution in any case need only take care to spend a great deal of time on the jury selection process to add weight to its claim of good faith.

The prosecutor may not even have been aware of her motives in striking all of the black jurors, but her reasons for making her selections cannot withstand even the most cursory scrutiny. Her reasons in two cases applied equally strongly to white veniremembers, yet she struck the blacks. Her reason in the third case was wholly subjective, based upon an "attitude" which the trial judge never noticed.

The intent of Batson is to prevent prosecutors from striking members of minority racial groups from venire panels based upon their race. Prosecutors cannot be allowed to escape that prohibition by claiming, without more, wholly subjective bases or bases that apply equally well to while veniremembers. Prosecutors who do wish to deliberately exclude minorities could easily justify their conduct on those grounds.

CONCLUSION

For all the foregoing reasons the Court is respectfully urged to grant this Petition for a Writ of Certiorari to issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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